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No. 84-176

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UTILITY CONSULTING SERVICES, INC.,

Appellant,

v.

CITY OF SAN JUAN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

BRIEF OF APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS OR TO AFFIRM

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Appellant Utility Consulting Services, Inc. ("UCS") files this brief in opposition to the City's Motion to Dismiss or to Affirm.

ARGUMENT

1. The City's principal argument for dismissal of this appeal is that UCS's motion filed in the Supreme Court of Puerto Rico on April 23, 1984, was not a timely "petition for rehearing" within the meaning of this Court's Rule 11.2 and that, as a result, the subsequent notice of appeal was filed out of time. That assertion is incorrect because it rests on a misunderstanding of both this Court's rules and the rules of the Supreme Court of Puerto Rico.

The City makes much of the titles given to UCS's post-judgment motions. Motion to Dismiss at 2-3. These characterizations, however, are of no legal consequence. The initial request for reconsideration was styled a "Motion for Reconsideration of Judgment" (Motion to Dismiss App. I). The later request, upon which UCS relies here as timely raising the federal issues, was titled a "Motion Seeking to Set Aside Judgment" (Motion to Dismiss App. V). This Court's rules, however, use the term "petition for rehearing" in the generic sense. Any post-judgment application that is acceptable under the practice of a lower court and that urges a revision in the decision will—if timely under that court's rules—constitute a "petition for rehearing" for the purpose of calculating the timeliness of a subsequent appeal to this Court. The reason is that the pendency of such a motion asking the court to reconsider questions decided "suspend[s] the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties," and therefore the running of the time for appeal is suspended until such a motion is decided. *Department of Banking v. Pink,* 317 U.S. 264, 266 (1943); *see* R. Stern & E. Gressman, SUPREME COURT PRACTICE § 6.3 at 398-99 (5th ed. 1978). The application of this principle does not turn on the title given the motion, but on its procedural effect. The City's argument, therefore, should turn on the timeliness of the motion, not its caption.[1]

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[1] The City inexplicably suggests that its translation of the order on which UCS relies and our translation differ "significantly". Motion to Dismiss at 3, ¶ 8. The only difference that we have detected is that the City translates the motion as one "to set aside judgment" (Motion to Dismiss App. V) and UCS translated the motion as one "to vacate judgment" (Jurisdictional Statement App. C). Either translation is acceptable and the distinction has no jurisdictional significance. As the City's own translation shows (Motion to Dismiss App. V), UCS expressly asked the Supreme Court of Puerto Rico to

(footnote continues)

2. Despite the City's assertion to the contrary, UCS's motion of April 23, 1984, was timely. Rule 45 of the Rules of the Puerto Rico Supreme Court governs motions for reconsideration. Of critical importance here, that Rule recognizes, first, that successive requests for reconsideration are permissible and, second, that any such motion is timely, regardless of when it is filed, if the Clerk has not yet issued the mandate. UCS's motion raising the federal issues was timely under that system.

Rule 45, which is set forth in full in Appendix A, *infra,* establishes a ten-day time period once an initial decision is handed down, after which the Clerk of the Court is to issue the mandate to the lower court, thereby ending the court's jurisdiction over the matter. Rule 45(a). The Rule then states that ordinarily motions for reconsideration must be filed within that ten-day period. Rule 45(b). The Rule also provides that the mandate will issue three days after denial of an initial motion for reconsideration and that "any subsequent motion for reconsideration shall be filed within said [three day] term." Rule 45(c).

Nevertheless, those time periods are only guidelines, not jurisdictional limits. Rule 45 expressly allows the filing of *any* motion for reconsideration, including a successive one, at *any* time before the mandate issues. Thus, Rule 45(d) provides

> "(d) Any motion for reconsideration filed out of the aforementioned terms shall be considered by the Court only in the degree in which

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(footnote continued)

set aside ("vacate") its judgment on the grounds that the decision deprived UCS of its "property without due process of law, in violation of the Fourteenth Amendment" and interfered with UCS's "constitutional right . . . to freedom of contract in violation of Article I, clause 10 of the Constitution of the United States of America." The motion was, therefore, a clear and unambiguous request that the Supreme Court of Puerto Rico reconsider its decision because of its conflicts with the United States Constitution.

> what is requested therein can be totally or partially granted without adversely affecting the execution of the mandate."

A motion to reconsider, therefore, is timely and will be considered on its merits as long as, and to the degree that, the compliance with the mandate is unaffected.

Under these procedures, the motion on which UCS relies here was timely filed. In this case, no mandate was issued prior to the filing of that motion on April 23. As the City acknowledges, UCS had asked the court on March 28 to stay issuance of the mandate and it repeated that request again on April 17, 1984 (Motion to Dismiss App. III and IV). That second motion was not denied until May 3, 1984, in the same order in which the court denied the motion for reconsideration on which UCS relies for jurisdictional purposes. In the meantime, as the City does not mention, no mandate had issued before the court disposed of UCS's motion. Therefore, the motion was filed and considered in a timely manner within the meaning of the Puerto Rico Supreme Court rules. Significantly, there is no indication that the court below treated the motion as untimely or refused to consider it on its merits. On the contrary, one of the Justices voted to "reconsider". Motion to Dismiss App. VI.

Since the motion was timely filed under the rules of practice of the Supreme Court of Puerto Rico, the Notice of Appeal and the Jurisdictional Statement, which were filed within 90 days of the denial of the motion on May 3, 1984, were timely to invoke this Court's jurisdiction.[2]

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[2] The City refers to the pendency of its motion before the Supreme Court of Puerto Rico seeking dismissal of this appeal as untimely. Motion to Dismiss at 4. As its motion shows, however, the City is relying solely on its erroneous interpretation of this Court's rules, not on any failure to comply with the rules of the court below. *See* Motion to Dismiss App. VII. Of course, that motion is in the wrong forum, since this court has exclusive jurisdiction to determine the timeliness of this appeal, *see* Supreme Court Rule 16.1(b), and any action by the court below on this issue would be a nullity.

3. The City also suggests that UCS did not raise the federal issues in a timely manner because they were raised in a second request for reconsideration, rather than the initial one. Motion to Dismiss at 2, ¶ 2. The City implicitly concedes, therefore, as it must, that the grounds for the decision by the Supreme Court of Puerto Rico were a genuine surprise and that, as a result, the failure to raise the federal issues before the release of its opinion simply reflected the fact that the City itself had never invoked Section 1210 of the Civil Code, 31 L.P.R.A. § 3375, as a basis for repudiating the contract.

As a practical matter, it was of no relevance that UCS's first reaction to the court's surprising invocation of Section 1210 did not interpose the federal objections. The purpose of this Court's requirement that a party raise federal issues at the earliest feasible opportunity reflects concern about fairness to adverse parties and state courts, to ensure that they have adequate opportunity to address the federal issues. The important fact is that UCS raised the federal issues at the first procedural stage it could and did so in a timely manner, thereby allowing the court below an opportunity to consider those federal principles.

The court below did not receive additional briefing on the first motion and did not grant reconsideration. The court had just as much opportunity to address the federal issues when they were raised in the subsequent timely motion. Quite simply, the court below refused to reconsider its decision in light of the federal constitutional claims, and there is no reason to believe that the sequence of requests for reconsideration had any effect on the court's treatment of the federal issues.

4. The City makes little effort to support the constitutionality of the judgment below on its merits. It simply implies that there is some arcane "Civil Law Doctrine of unforeseeability" (Motion to Dismiss at 4) that provides constitutional justification for the lower

court's interpretation and application of the statute in this case. In fact, however, the court discussed "unforeseeability" only in the context of the alleged "unconscionability" of enforcing the contract here. The court theorized that it must have been "unforeseeable" that UCS could save the City a substantial amount of money with what the Court characterized as little effort. *See* Jurisdictional Statement App. 2a. The issue is whether a statute is constitutional that is interpreted and applied to make that assertion a ground to nullify a freely negotiated, arms-length agreement with a municipality.

CONCLUSION

The Court should deny the motion to dismiss or to affirm and should note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

Rule 45 of the Puerto Rico Supreme Court

Rule 45. Motions for reconsideration; mandates

(a) Ten working days after copy of the decision of the Court rendered in a case has been sent to the parties, the Clerk shall send the mandate to the trial court, unless a motion for reconsideration has been filed within said term, or the Court has ordered the retention of the mandate.

(b) Any motion for reconsideration must be filed within the aforementioned term of 10 working days. No separate memorandum of authorities or a petition for extension to ground a reconsideration filed shall be accepted; the authorities must be discussed in the body of the motion. The Clerk shall deny outright any petition for extension to file a motion for reconsideration, or papers in support thereof.

(c) Once the motion for reconsideration has been decided, the mandate shall be sent three working days after the copy of the order regarding the reconsideration has been sent to the parties, and any subsequent motion for reconsideration shall be filed within said term.

(d) Any motion for reconsideration filed out of the aforementioned terms shall be considered by the Court only in the degree in which what is requested therein can be totally or partially granted without adversely affecting the execution of the mandate.

(e) In any case in which a judgment or order of this Court may be reviewed by the Supreme Court of the United States by way of certiorari, the mandate to the trial court may be retained, at the request of a party, for a reasonable period of time. If within such term there shall be filed with the office of the Clerk a certificate from the Clerk of the Supreme Court of the United States estab-

lishing the fact that the petition for certiorari, the record, and the brief have been filed before that Court, the mandate shall be retained until final disposition of the petition for certiorari. Upon presentation of a copy of the order of the Supreme Court of the United States denying the issuance of the writ, the mandate shall forthwith be sent to the trial court. In the motion for retention of the mandate, the moving party shall recite the questions to be raised in the petition for certiorari, making reference to the pertinent facts and circumstances of the case.